by an arbitrator, not a court, if the arbitration provision is otherwise enforceable. The arbitration agreement is separable from the overall contract as a matter of *federal* substantive arbitration law, even if separability would not be permitted by state law. 388 U.S. at 402-04. The *Cardegna* court flouted the FAA and *Prima Paint* in holding that separability is determined by state law principles and that courts, not arbitrators, should determine the validity of the contract containing the arbitration clause.[2] This Court granted certiorari to review the *Cardegna* court's aberrational ruling. There is nothing to correct in this case since the Court of Appeals properly applied *Prima Paint*.[3]

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[2] *Prima Paint* was binding on the Florida Supreme Court because the FAA creates a body of federal substantive law of arbitrability that applies in both federal and state courts. *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 272 (1995); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

[3] Tacitly conceding that the law is not on her side, Petitioner digresses into a misplaced, and egregiously erroneous, *ad hominem* attack on the payday loan industry. (*E.g.*, Pet. at 1-2, 7-10). Respondents vigorously dispute Petitioner's assertions but do not engage in a detailed rebuttal here because those assertions are legally irrelevant to the federal arbitration question at hand. There is no exception in the FAA for payday lending disputes, and every Federal Circuit Court that has addressed the issue has held that under *Prima Paint*, an otherwise valid arbitration agreement contained in a payday loan contract is valid and enforceable. *See Jenkins v. First American Cash Advance of Ga., Inc.*, 400 F.3d 868, 882 (11th Cir. 2005) ("allegations claiming [that] high interest loan agreements are void as illegal will not preclude the enforcement of arbitration provisions included in the allegedly illegal contracts"); *Bess v. Check Express*, 294 F.3d 1298, 1305 (11th Cir. 2002) ("the issue raised by [plaintiff]—whether the deferred payment transactions are void as illegal—is one for the arbitrator, not the court . . . ."); *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 637 (4th Cir. 2002) ("[Plaintiff's] allegations of usurious rates of interest ... do not relate specifically to the Arbitration Agreement. Neither do they underlie a claim that [Plaintiff] failed to assent to the terms of the . . . Agreement"); *Burden v. Check into Cash of Ky., LLC*, 267 F.3d 483, 490 (6th Cir. 2001) (plaintiffs' allegations that

COUNTERSTATEMENT OF THE CASE

Petitioner-plaintiff Charlene Jenkins brought a putative class action lawsuit against Respondents-defendants the Bank and First American in the Superior Court of Richmond County, Georgia in May 2003. The Bank is a national bank, chartered under the National Bank Act, with its principal offices in South Dakota. (App. 2a-3a, 6a-7a, 27a-28a). First American managed and serviced the loans made by the Bank to Petitioner.[4] (*Id.*).

Petitioner's complaint alleged state law usury claims under the Georgia Industrial Loan Act, the Georgia criminal usury statute and the Georgia RICO statute. (App. 5a). All of Petitioner's claims arose out of eight loans she obtained from the Bank between June 7, 2002 and September 6, 2002. (App. 3a). Each loan was evidenced by a Promissory Note which included an Arbitration Agreement. Petitioner signed each Promissory Note and each Arbitration Agreement. (App. 3a, 26a).

The Arbitration Agreement broadly applied to the borrower, the Bank and First American and stated that any party to a "dispute" may demand arbitration. (Ct. App. Doc. 22—Pg 3; Ct. App. Doc. 4—Ex D). The Arbitration Agreement stated that the term "dispute" is to be "given the broadest possible meaning."—"Dispute" is defined as including without limitation "all federal or state law claims, disputes or controversies arising from or relating directly or indirectly to this Loan Agreement" and "all claims based upon a violation

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deferred payment contracts were void as illegal constituted a challenge to the substance of the loan agreements and thus were for arbitrator, not court, to decide), *cert. denied*, 535 U.S. 970 (2002).

[4] Both the Court of Appeals and the District Court held that the Bank was the true lender and rejected Petitioner's contention that First American was the real lender (App. 7a, 27a-28a). Petitioner does not seek certiorari with respect to that conclusion.

of any state or federal . . . statute . . . ." Therefore, the Arbitration Agreement indisputably covered Petitioner's claims that her payday loan contracts violated state usury statutes.

Respondents removed the lawsuit to the United States District Court for the Southern District of Georgia on June 25, 2003. (App. 6a). The basis for removal was the National Bank Act, 12 U.S.C. §§ 85 and 86, which completely preempts state usury laws with regard to credit extended by a national bank and provides the exclusive remedy for usury claims against a national bank. *See Beneficial Nat'l Bank v. Anderson*, *supra*.

Petitioner filed a motion to remand the case to state court. The District Court denied the motion and held that a federal question existed because Sections 85 and 86 of the National Bank Act completely preempt all of Petitioner's state law usury claims. (Ct. App. Doc. 9—p. 5, *citing Anderson*, *supra*).

Respondents then moved under Sections 3 and 4 of the FAA, 9 U.S.C. §§ 3-4, to stay the litigation and compel arbitration pursuant to the Arbitration Agreements contained in Petitioner's loan contracts. On November 25, 2003, the District Court denied Respondents' motion and refused to stay the litigation or compel arbitration. (App. 25a). In its Order, the District Court properly found, *inter alia*, that "[Petitioner] signed and dated an Arbitration Agreement each time she took out a loan with [Respondents]" (App. 26a) and that the transactions in question involved "sufficient interstate commerce" for the FAA to apply (App. 27a-28a). It was also undisputed that the Arbitration Agreements covered Petitioner's claims.

Nevertheless, the District Court found the Arbitration Agreement to be unconscionable under Georgia law because it was allegedly adhesive in nature, supposedly lacked mutuality and contained a class action waiver. (App. 28a-32a). The District Court did not address Petitioner's assertion

that the Promissory Note violated Georgia law and was void ab initio.

On appeal, a unanimous panel of the United States Court of Appeals for the Eleventh Circuit affirmed the existence of federal jurisdiction. The Court of Appeals emphasized that:

> "'In actions against national banks for usury, [§§ 85 and 86] supercede both the substantive and the remedial provisions of state usury laws and create a federal remedy for overcharges that is exclusive, even when a state complainant, as here, relies entirely on state law. Because §§ 85 and 86 provide the exclusive cause of action for such claims, there is, in short, no such thing as a state-law claim of usury against a national bank.'" (App. 6a) (quoting *Beneficial Nat'l Bank v. Anderson*, *supra*, 123 S. Ct. at 1264) (emphasis added).[5]

On the merits of the appeal, the Court of Appeals reversed, holding that the District Court erred in finding the Arbitration Agreement to be unconscionable and refusing to compel arbitration. (App. 1a). With respect to the issue raised in the instant Petition,[6] the Court of Appeals rejected Petitioner's argument that her claims should not be arbitrated because the arbitration provision was contained in a usurious loan agreement which was illegal and void ab initio under Georgia law. (App. 19a-23a). The Court of Appeals reasoned that under the FAA and *Prima Paint*, such broad-based challenges to the entire agreement (rather than the arbitration provision itself) are for the arbitrator, not a court, to decide. (*Id.*).[7] The

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[5] Petitioner has not sought certiorari with respect to this conclusion.

[6] Petitioner does not challenge any of the other conclusions or findings of the Court of Appeals.

[7] Petitioner erroneously asserts that the Court of Appeals held that the "trial court had no right to determine the validity of the agreement to arbitrate . . . ." (Pet. at 5). On the contrary, the Court properly held that under the FAA and *Prima Paint*, the validity of the arbitration agreement

Court of Appeals declined petitioner's invitation to follow *Cardegna* (App. 20a) and remanded to the District Court with instructions "to grant [Respondents'] motion to compel arbitration." (App. 24a).

REASONS FOR DENYING THE PETITION

Rule 10 of the Rules of the United States Supreme Court provides in pertinent part as follows:

> "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; [or] has decided an important federal question in a way that conflicts with a decision by a state court of last resort;
>
> * * *
>
> (c) a . . . United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

None of the reasons specified in Rule 10 for granting a writ of certiorari exists in the present case. Petitioner's heavy reliance upon *Cardegna* is misplaced because the National Bank Act completely preempts state usury law in this case and, in any event, *Cardegna* was wrongly decided. Nor is

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itself (but not the validity of the underlying contract) is for the court to determine. (App. 23a).

Petitioner's argument that the Court of Appeals "misapplied *Prima Paint*" and its own prior decisions (Pet. at 11, 14-15) the least bit persuasive. Even if that were the case—and it is not—it would not merit review by this Court.

I. UNLIKE THE PRESENT CASE, *CARDEGNA* DID NOT INVOLVE A NATIONAL BANK AND WAS WRONGLY DECIDED

A. *Cardegna* Did Not Involve the National Bank Act

Ultimately, the remedy in this case—if any[8]—will *not* derive from Georgia law or any other state law. The remedy will be dictated by the National Bank Act, 12 U.S.C. §§ 85-86, because the Bank, which made the loans in question, is a national bank. These federal statutes permit a borrower from a national bank to bring an "action in the nature of an action of debt" (12 U.S.C. § 86) and, if successful, to obtain a double-interest penalty and a forfeiture of unpaid interest. **They do not render the loans void**, in contrast to alleged Georgia law. As this Court held in *Oates v. First Nat'l Bank of Montgomery*, *supra*, 100 U.S. at 249-50:

> "The statute under which the bank was organized, known as the National Banking Act, does not declare the contract, under which the usurious interest is paid, to be *void*. It denounces no penalty other than a forfeiture of the interest which the note or bill carries, giving to the

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[8] National banks are permitted under 12 U.S.C. § 85 to charge interest at the rates allowed by the laws of the states where they are located, notwithstanding more restrictive usury laws that otherwise apply in the borrowers' state. *Marquette Nat'l Bank of Minn. v. First of Omaha Serv. Corp.*, 439 U.S. 299 (1978). In South Dakota, where Respondent Bank is located, "regulated lenders" (which includes national banks) "are exempt from all limitations on the rate of interest which they may charge and are further exempt from the operation and effect of all usury statutes," with certain exceptions not applicable here. S.D. Cod. Laws § 54-3-13 (2005).

> debtor the right to sue for and recover twice the amount of interest so paid." (Emphasis in original).

Unlike *Cardegna*, where the loan was not made by a national bank and no national bank was named as a defendant, the Bank made the loan and is a named defendant in this case. Indeed, this action was removed to federal court based upon the complete preemption principles most recently addressed in *Beneficial Nat'l Bank v. Anderson*, *supra*. In *Anderson*, this Court held that Sections 85 and 86 of the National Bank Act completely preempt state usury laws with regard to credit extended by a national bank and provide the exclusive remedy for usury claims against a national bank. This Court instructed:

> "In actions against national banks for usury, these provisions [§§ 85 and 86 of the National Bank Act] supersede both the substantive and the remedial provisions of state usury laws and create a federal remedy for overcharges that is exclusive, even when a state complainant, as here, relies entirely on state law. Because §§ 85 and 86 provide the exclusive cause of action for such claims, there is, in short, no such thing as a state-law claim of usury against a national bank. Even though the complaint makes no mention of federal law, it unquestionably and unambiguously claims that petitioners violated usury laws. This cause of action against national banks only arises under federal law and could, therefore, be removed under § 1441." 539 U.S. at 10.

Therefore, Petitioner's overarching contention—that the loan agreements in this case are illegal under Georgia's usury laws and void ab initio (Pet. at 8-10, 15-16)—is a chimera. The merits of Petitioner's overcharge claims will be decided under federal, not state, law and the loans will never be voided.[9] Because that will be the case no matter how this

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[9] Respondent First American is not a national bank. However, that does not alter this analysis. All of Petitioner's claims are based upon the

Court rules in *Cardegna*, this Court should permit the arbitration ordered by the Court of Appeals to go forward now.

B. *Cardegna* Is an Anomaly Which Should Be Corrected Without Delaying the Arbitration in This Case

Respondents filed their motion to compel arbitration on June 25, 2003. The District Court issued its decision denying arbitration on November 25, 2003. The Court of Appeals issued its ruling reversing the District Court and compelling arbitration on February 18, 2005. After unsuccessfully moving for reconsideration in the Court of Appeals and obtaining an extension from this Court, Petitioner filed her Petition for Certiorari on September 12, 2005. Therefore, after more than two years, this matter is finally on the verge of arbitration, awaiting only this Court's denial of certiorari.

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allegation that her loans were usurious under Georgia law. (Complaint, Ct. App. Doc. 1, ¶¶ 12, 16, 18). As discussed heretofore: (a) both the District Court and the Eleventh Circuit found that the Bank was the true lender on Petitioner's loans and First American was the servicer (those conclusions are not challenged by Petitioner); (b) the legality of the loans made by the Bank to Petitioner must be evaluated under the National Bank Act, which completely preempts state usury laws; (c) national banks are permitted to charge interest at the rates allowed by the laws of the states where they are located, notwithstanding more restrictive usury laws that otherwise apply in the borrowers' states; (d) South Dakota, where the Bank is located, does not impose a cap on the interest rate a national bank may charge and exempts national banks from all usury laws; and (e) even if there were a question in this case of overcharging interest, the penalty applicable to a national bank that charges usurious interest is forfeiture of unpaid interest and payment of twice the amount of interest paid; there is no voiding of the loan. Since the Bank's loans are clearly lawful under applicable federal law, it follows that the servicer also cannot be liable. In any event, any remedy would be dictated by federal, not state, law. This contrasts with *Cardegna*, where the lender was a Florida company which was not a national bank.

There is no reason to delay arbitration any longer by holding this case for review pending this Court's decision in *Cardegna*. In *Cardegna*, the Florida Supreme Court acted in derogation of the FAA and *Prima Paint* by holding that state law, rather than federal law, should be used to determine the question of who—an arbitrator or a court—has the authority to determine a claim that the contract containing the arbitration provision is illegal under state law. As the dissent in *Cardegna* emphasized:

> "The issue in this case is not whether a check-cashing contract is void as usurious. That issue will be determined under Florida law. The issue here is *who decides* whether the contract is void—the arbitrator, as provided in the contract itself, or the court. That issue must be decided under federal law, specifically the Federal Arbitration Act. The majority confuses these issues. The majority also disregards the plain language of the Federal Arbitration Act, fails correctly to apply the United States Supreme Court's decision in *Prima Paint* . . . and either ignores or fails to distinguish the federal cases compelling arbitration in identical circumstances." 894 So. 2d at 867-68 (Cantero, J., dissenting) (emphasis in original).

By contrast, in the present case, the Court of Appeals followed *Prima Paint* and properly applied federal law, not state law, in determining the issue of separability. *See Jenkins*, 400 F.3d at 882 n. 13 ("We note this [void ab initio] issue raised a question of federal law—namely, deciding whether the district court has the authority under the FAA to adjudicate Jenkins' claim that the payday lending transactions were illegal . . . . In deciding this federal question, we do not pass judgment on any issue of Georgia contract law.").

Cardegna is the latest in a line of cases in which this Court has undertaken review of state supreme court decisions misapplying the FAA. *See, e.g., The Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003) (this Court rejected the "sub-

stantial effect" test applied by the Alabama Supreme Court and held that the FAA's commerce requirement embodies "the broadest permissible exercise of Congress' Commerce Clause power"); *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996) (this Court held that the FAA preempted a Montana statute that required the first page of a contract to contain a notice in underlined capital letters that the contract was subject to arbitration); *Allied-Bruce Terminix Cos. v. Dobson*, *supra* (this Court held that an arbitration agreement governed by the FAA is not invalidated by Alabama's anti-arbitration statute); *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (this Court invalidated California statute that required judicial consideration of claims). *Cardegna* does not reflect any "emerging conflict" between state and federal courts on the application of *Prima Paint* in payday loan cases, as hypothesized by Petitioner. (Pet. at 2). It is simply an erroneous decision by one court which was bound by, but which refused to follow, the FAA and *Prima Paint*, *supra*.

Delaying arbitration in the present case, which was correctly decided, until *Cardegna* is adjudicated will only serve to defeat the FAA's command for prompt resolution of arbitrable matters. *See Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, *supra*, 460 U.S. at 22 (Sections 3 and 4 of FAA "call for an expeditious and summary hearing" on motion to compel arbitration as it was "Congress' clear intent . . . to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible"). *Prima Paint*'s conclusion that federal courts can consider only issues relating to the making and performance of the agreement to arbitrate "not only honor[s] the plain meaning of the statute but also the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." *Prima Paint*, 388 U.S. at 404.

II. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH OR MISAPPLY CONTROLLING PRECEDENT

A. The Court of Appeals Properly Applied *Prima Paint*

Petitioner errs in asserting that the Court of Appeals misapplied *Prima Paint*. (Pet. at 11-12). On the contrary, the Court correctly applied *Prima Paint* in holding that an arbitrator, not a court, should determine Petitioner's allegation that the loan contract as a whole (not just the arbitration provision that was part of that contract) violated state law and was void ab initio.

In *Prima Paint*, a party to a consulting contract which contained an arbitration clause sought to rescind the contract on the ground that it had been fraudulently induced. The seller sought to enforce the arbitration clause. This Court held that because plaintiff claimed that the contract as a whole was fraudulently induced, it was for the arbitrator, not a court, to adjudicate plaintiff's fraudulent inducement defense.

In reaching this conclusion, the *Prima Paint* Court endorsed the doctrine of "separability" under which arbitration clauses are analyzed separately from the contracts which contain them. The Court held that separability was a question of *federal* law under the FAA, not state law. It had granted certiorari in *Prima Paint* to resolve a dispute between the Second Circuit and the First Circuit on that very issue:

> "The view of the Court of Appeals for the Second Circuit, as expressed in this case and in others, is that . . . arbitration clauses, as a matter of federal law, are 'separable' from the contracts in which they are embedded, and that where no claim is made that fraud was directed to the arbitration clause itself, a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud. The Court of Appeals for the First Circuit, on the other hand, has taken the view that the

> question of 'severability' is one of state law, and that where a State regards such a clause as inseparable a claim of fraud in the inducement must be decided by the court." 388 U.S. at 402-03.

Construing the language of the FAA, this Court endorsed the position of the Second Circuit that separability is a question of *federal* law, holding that:

> "[I]f the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the 'making' of the agreement to arbitrate—the federal court may proceed to adjudicate it. But the statutory language [the FAA] does not permit the federal court to consider claims of fraud in the inducement of the contract generally." *Id.* at 403-04.

See also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., *supra*, 460 U.S. at 24 (*Prima Paint*'s separability rule is "federal substantive law of arbitrability").

In the 40 years since *Prima Paint* was decided, courts have applied its separability rule in a wide variety of factual contexts, not just in "fraud in the inducement" cases.[10] In particular, numerous courts, including the Court of Appeals herein, have held that *Prima Paint* applies to claims that the contract containing the arbitration clause is void and unenforceable under state law. *See, e.g., John B. Goodman Ltd. P'ship v. THF Constr., Inc.*, 321 F.3d 1094, 1095-97 (11th

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[10] *See, e.g., Unionmutual Stock Life Ins. Co. of Am. v. Beneficial Life Ins. Co.*, 774 F.2d 524, 529 (1st Cir. 1985) ("[t]he basis of the underlying challenge to the contract does not alter the severability principle"); *Northwestern Nat'l Life Ins. Co. v. U.S. Healthcare, Inc.*, No. 96-4659, 1998 WL 252353, at *7 (E.D. Pa. May 11, 1998) ("'The teaching of *Prima Paint* is that a . . . court must not remove from the arbitrator's consideration a substantive challenge to a contract unless there has been an independent challenge to the making of the arbitration clause itself. The basis of the underlying challenge to the contract does not alter the . . . principle.'") (citation omitted).

Cir. 2003) (court enforced arbitration clause in construction contract despite plaintiff's contention that contract was unenforceable under Florida law because it was performed by unlicensed contractor); *Snowden v. Checkpoint Check Cashing*, *supra*; *Burden v. Check into Cash of Ky., LLC*, *supra*; *Harter v. Iowa Grain Co., Inc.*, 220 F.3d 544, 550 (7th Cir. 1996) (arbitration compelled even though plaintiff contended that underlying contracts violated Commodity Exchange Act); *Mesa Operating Ltd. P'ship v. Louisiana Intrastate Gas Corp.*, 797 F.2d 238, 244 (5th Cir. 1986) (claim that contract was void under state statute was issue for arbitrator, not court, to decide); *National R.R. Passenger Corp. v. Consolidated Rail Corp.*, 892 F.2d 1066, 1072 (D.C. Cir. 1990) (whether contract calls for commission of illegal act or violates public policy is for arbitrator); *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs., Inc.*, 86 F.3d 656, 659 (7th Cir. 1996) ("[a]lthough the arbitration clause is contained in a contract that the tribe contends is illegal, the tribe rightly does not argue that the illegality of the contract infects the arbitration clause").[11]

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[11] *See also Belship Navigation, Inc. v. Sealift, Inc.*, No. 95-2748, 1995 WL 447656, at *5 (S.D.N.Y. July 28, 1995) ("even if a contract is void ab initio, if the making of the arbitration agreement is not called into question, then the arbitration agreement contained within the void contract remains separate and enforceable"); *Advanced Tech. Assocs., Inc. v. Seligman*, No. 97-2374-GTV, 1997 WL 756604, at *3 (D. Kan. Nov. 18, 1997) ("Plaintiff argues that, because the Software License Agreement is void, the arbitration clause found therein must be unenforceable. The court disagrees."); *McGuire, Cornwell & Blakey v. Grider*, 765 F. Supp. 1048, 1050 (D. Col. 1991) (contention that entire contract was void must be decided by arbitrator); *Timberton Golf, L.P. v. McCumber Constr., Inc.*, 788 F. Supp. 919 (S.D. Miss. 1992) (it was for arbitrator to decide whether contract was void under state law because defendant had failed to obtain a certificate of responsibility); *Herwig v. Hahnaman-Albrecht, Inc.*, No. 96-C-6107, 1997 WL 72079, at *3 (N.D. Ill. Feb. 13, 1997) ("[b]ecause we find the arbitration clause to be enforceable, arguments about the legality of the underlying contracts are for the arbitrators, not

As stated in *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, *supra*, 460 U.S. at 24: "Although our holding in *Prima Paint* extended only to the specific issue presented, the courts of appeals have since consistently concluded that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. We agree."

In this case, Petitioner asserted that the Arbitration Agreements should not be enforced because the payday loan contracts in which they were contained were illegal under Georgia law and void ab initio. It was undisputed that Petitioner assented to the loan contracts and the Arbitration Agreements[12] and that the Arbitration Agreements broadly encompassed Petitioner's allegations of illegality. The Court of Appeals, applying *Prima Paint*, properly held that Petitioner's contention that the underlying loan contracts violated state law did *not* preclude enforcement of the separable and otherwise valid Arbitration Agreements. Quoting from its prior decision in *Bess v. Check Express*, *supra*,[13] the Eleventh Circuit explained:

> "'[Plaintiff] urges that the transactions in this case are void, not because he failed to assent to the essential

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this court, under the Supreme Court's holding in *Prima Paint* . . ."); Ian R. MacNeil, 2 *Federal Arbitration Law*, § 15.3.2 (1994) (*Prima Paint* applies to claims of "illegality").

[12] Neither in the District Court nor in the Court of Appeals was any issue raised concerning Petitioner's "acumen" or "intelligence." (*See* Pet. at 6). Petitioner has waived the issue. *See Lomarest v. Manspeaker*, 498 U.S. 184, 189 (1991) ("Respondents did not raise this question in the courts below, and we decline to consider it here for the first time").

[13] In *Bess*, plaintiff argued that the arbitration clause should not be enforced because the loan contract in which it was contained violated Alabama usury law and was void ab initio. The Court of Appeals held that under *Prima Paint*, because the allegations of illegality went to the loan contract as a whole, not to the arbitration clause specifically, and challenged the "content" of the contract rather than its "existence," the arbitration clause was enforceable and it was for the arbitrator, not a court, to decide plaintiff's illegality defense. 294 F.3d at 1305-06.

> terms of the contracts, but because those terms allegedly render the contracts illegal under [state] law. At bottom, [plaintiff] challenges the content of the contracts, not their existence. Indeed . . . , both the arbitration agreement and the deferred payment contracts were signed by [plaintiff], and there is no question about [plaintiff's] assent to those contracts . . . . Therefore, the issue raised by [plaintiff]—whether the deferred payment transactions are void as illegal—is one for the arbitrator, not the court . . . .'" (App. 22a).

Nothing in *Prima Paint* suggests that this Court was limiting the application of that case only to contracts that were "voidable" rather than "void." (*See* Pet. at 11). The "void versus voidable" distinction is purely a creature of state law, whereas the *Prima Paint* separability rule is substantive federal arbitration law. Significantly, although Petitioner asserts that *Prima Paint* does not apply where the underlying contract is void rather than voidable (Pet. at 11-12), the dissent in *Prima Paint* assumed that the company's fraudulent inducement defense rendered the underlying contract "void":

> "The Court here holds that the United States Arbitration Act, 9 U.S.C. §§1-14, as a matter of federal substantive law, compels a party to a contract containing a written arbitration provision to carry out his 'arbitration agreement' even though a court might, after a fair trial, hold the entire contract—including the arbitration agreement—*void* because of fraud in the inducement. The Court holds, what is to me fantastic, that the legal issue of a contract's *voidness* because of fraud is to be decided by persons designated to arbitrate factual controversies arising out of a valid contract between the parties." 388 U.S. at 407 (Black, J., dissenting) (emphasis added).

Petitioner herein is essentially making the same argument that the dissent made in *Prima Paint*—an argument that was *rejected* by the *Prima Paint* majority almost 40 years ago.

B. The Court of Appeals Correctly Applied the FAA

Contrary to Petitioner's assertion (Pet. at 13), the Court of Appeals' decision was not in any way inconsistent with the FAA. The federal statute directs courts to compel arbitration where "the making of the agreement for arbitration . . . is not in issue." 9 U.S.C. § 4. Here, it is undisputed that Petitioner assented to the Arbitration Agreements and that the broad Arbitration Agreements covered her claim that the underlying loan contracts violated state statutes.[14] Arbitration was properly compelled by the Court of Appeals.

Although Section 2 of the FAA, 9 U.S.C. § 2, permits a party opposing arbitration to assert defenses to the arbitration provision based upon generally applicable state law principles (Pet. at 13), the law that Petitioner relies upon is *not* generally applicable state contract law. Rather, Petitioner relies upon "Georgia's strong public policy against payday lending activities" as reflected in "judicial and legislative pronouncements against payday lending practices" and the state legislature's "efforts to criminalize, cease and prosecute payday lenders . . . ." (Pet. 8-10). As numerous Federal Circuit Courts, applying *Doctor's Associates, Inc. v. Casarotto, supra*, have held in analogous contexts, the FAA preempts

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[14] Petitioner errs in asserting that the arbitration provision was put "in issue" by her challenge to the validity of the underlying loan agreements. (Pet. at 14-15). Petitioner simply ignores *Prima Paint*'s holding that the arbitration provision is separable from the main contract. Neither *Chastain v. Robinson-Humphrey Co., Inc.*, 957 F.2d 851 (11th Cir. 1992), nor *Cancanon v. Smith Barney, Harris, Upham & Co.*, 805 F.2d 998 (11th Cir. 1986) (Pet. at 12, 14-15), helps Petitioner. Those cases involved the different issue of whether the plaintiff had validly "assented" to the contract in which the arbitration clause was included. (*See* App. at 20a-21a). In this case, Petitioner indisputably assented to the loan agreements and the Arbitration Agreements. In any event, it is not the role of this Court on certiorari to review whether a circuit court ruling is consistent with earlier decisions by that circuit.

state law that does not apply to all types of contracts in a state. *See Bradley v. Harris Research, Inc.*, 275 F.3d 884, 892 (9th Cir. 2001) (FAA preempted Cal. Bus. & Prof. Code §20040.5 because it was "not a generally applicable contract defense that applies to any contract, but only to forum selection clauses in franchise agreements").[15] *See also Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003) (because the California Consumer Legal Remedies Act is not a law of general applicability, it is preempted by the FAA and does not render a class action waiver in an arbitration agreement void); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, *supra*, 460 U.S. at 24 ("Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary").

Ironically, Petitioner argues that the Court of Appeals' decision contravenes *Casarotto*, *supra*, by creating "'a class of super [arbitration] clauses" which are "elevated" above the contracts in which they are contained. (Pet. at 3, 6). That argument is without merit. Under *Prima Paint* and the Court of Appeals' decision herein, the arbitration provision is merely considered separately from the remainder of the contract, consistent with the limited role of the court under the FAA in enforcing agreements to arbitrate. *See Prima Paint*, 388 U.S. at 395 (under Sections 3 and 4 of the FAA, "a federal court may consider only issues relating to the making

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[15] *Accord, KKW Enters., Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp.*, 184 F.3d 42 (1st Cir. 1999); *OPE Int'l LP v. Chet Morrison Contractors, Inc.*, 258 F.3d 443 (5th Cir. 2001); *Doctor's Assocs., Inc. v. Hamilton*, 150 F.3d 157, 163 (2d Cir. 1998); *Management Recruiters Int'l, Inc. v. Bloor*, 129 F.3d 851, 856 (6th Cir. 1997); *Alphagraphics Franchising, Inc. v. Whaler Graphics, Inc.*, 840 F. Supp. 708 (D. Ariz. 1993); *Michael v. NAP Consumer Elecs. Corp.*, 574 F. Supp. 68 (D. P.R. 1983).

and performance of the agreement to arbitrate").[16] Otherwise, as implicitly recognized in *Prima Paint*, few if any disputes would ever be arbitrated, since a party could defeat arbitration simply by alleging—as Petitioner does herein—that the underlying contract is invalid. The FAA was enacted "to overcome courts' refusals to enforce agreements to arbitrate" and to place such agreements upon the "same footing" as other contracts." *Allied-Bruce Terminix Cos. v. Dobson*, *supra*, 513 U.S. at 270-71 (citations omitted).

Petitioner errs in asserting that the Court of Appeals' decision will preclude enforcement of state usury laws. (Pet. at 13). As this Court has often recognized, arbitration does not deprive the parties of any substantive claims; it merely determines the forum for adjudicating those claims. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (by agreeing to arbitrate, "a party does not forgo . . . substantive rights" but "only submits to their resolution in an arbitral, rather than a judicial, forum"); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000) ("even claims arising under a statute designed to further important social policies may be arbitrated because 'so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum,' the statute serves its functions"). In this case, if state usury laws are not enforced, it will be because Petitioner obtained her loans from, and sued, a national bank, which is not bound by such laws, not because she has been required to resolve her disputes in arbitration.

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[16] This Court in *Prima Paint* explained that the limited role of the court in enforcing arbitration agreements "not only honor[s] the plain meaning of the statute [the FAA] but also the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." 388 U.S. at 404. Petitioner's argument that the FAA requires the judiciary to determine the validity of the contract in which the arbitration clause is contained (Pet. at 16-17) simply disregards both the FAA and *Prima Paint*.

Finally, Petitioner's reliance upon *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002) (Pet. 10-11), is misplaced. *Howsam* involved a completely different issue—namely, whether a court or an arbitrator should resolve a time-limit dispute—and did not even mention *Prima Paint*, much less purport to alter *Prima Paint*'s separability rule. The "gateway issue" properly addressed by the Court of Appeals in the instant case was whether a court or an arbitrator should determine Petitioner's contention that "the loan contracts are void, not because she failed to assent to them, but because those terms render the contracts usurious and void under Georgia law." (App. 23a). The Court of Appeals correctly answered that gateway question by applying federal arbitration law as mandated by *Prima Paint*.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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